In The

Supreme Court of the United States

October Term, 1978

No. 77-1816

FRANK DI GILIO and EUGENE SANGILLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND/OR RECONSIDERATION FOR ORDER DENYING PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF MOTION FOR REHEARING

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PETITION FOR REHEARING AND/OR RECONSIDERATION FOR ORDER DENYING PETITION FOR CERTIORARI

Frank Di Gilio, petitioner herein, presents petition for a rehearing and/or reconsideration of this Court's order dated October 2, 1978 denying the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit and, in support thereof, respectfully shows that the petition is based upon intervening circumstances constituting substantial grounds

available to this petitioner although not previously presented to this Court in that the determination of this Court in *Crist v. Bretz*, 98 S. Ct. 2156 (1978) is of such pertinence and importance as to mandate the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing and/or reconsideration be granted, and that, upon further consideration, a writ of certiorari issued to the United States Court of Appeals for the Third Circuit.

Dated: October 16, 1978

Respectfully submitted,

s/ ROBERT E. LEVY
Attorney for Petitioners
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Post Office Box 901
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(201) 988-5683

I, Robert E. Levy, attorney for the above named petitioner, do hereby certify that the foregoing petition for rehearing and/or reconsideration is presented in good faith and not in delay and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

Dated: October 16, 1978

s/ ROBERT E. LEVY
Attorney for Petitioners

In The

Supreme Court of the United States

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No. 77-1816

FRANK DI GILIO and EUGENE SANGILLO,

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vs.

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Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN SUPPORT OF MOTION FOR REHEARING

PRIOR ACTION

The Court denied the original petition for a writ of certiorari on October 2, 1978.

QUESTION PRESENTED ON PETITION FOR REHEARING

2. Whether petitioner Di Gilio's trial was barred by the double jeopardy clause.

STATEMENT

Subsequent to the filing of the brief and appendix on behalf of the petitioner, this Court issued its determination in *Crist v. Bretz*, 98 S. Ct. 2156 (1978). It is submitted that the determination in *Crist v Bretz* is such as to constitute an intervening circumstance of substantial and controlling effect which substantial ground is presently available to the petitioner and has not been previously presented.

ARGUMENT

Petitioner herein was one of several defendants, all of whom were charged in one indictment. On September 13, 1974, two of the co-defendants were severed from the balance of the defendants. On September 19, 1974, the remaining four defendants, including this petitioner, participated in the selection of a jury. The selection of the jury was completed on September 19, 1974 and its composition was satisfactory to the petitioner, who had determined that this was the jury that he wanted to have hear this cause.

For reasons not disclosed in the trial record, the jury was not sworn in on September 19, 1974 and the matter was then carried to the following Monday, September 23, 1974.

Prior to the swearing in of the jury, on September 23, 1974, an application was made by the United States Government to sever the petitioner herein. Counsel for the petitioner objected and set forth that he was ready, willing and able to participate in the trial; that he had appeared on each one of the previous trial dates; and had prepared to go to trial at all times. He registered his objection to the application for the severance. The trial court granted the application of the Government and the petitioner was not tried by the jury of his choice.

The petitioner was thereafter brought to trial in July of 1976 subsequent to a motion made by the petitioner in January of 1976 alleging that any further trial would result in double jeopardy.

The petitioner was found guilty and sentenced in 1976 and the present appeal is a result thereof.

Subsequent to the filing of the petitioner's brief and appendix, this Court considered the issues in *Crist v. Bretz*, 98 S. Ct. 2156 (1978) and its results therein mandates the issuance of the writ of certiorari previously petitioned herein.

It is conceded that in *Crist v. Bretz, supra*, the jury was sworn after its empanelment and prior to the dismissal of the indictment. It is submitted, herein, that the difference between the procedure in *Crist v. Bretz* and the procedure herein is one of form and not of substance. In both instances, the defendants particpated fully in the choice of a trial jury. In each instance, the defendants expressed their satisfaction with the jury, as constituted, for the trial of their cause. In the *Crist v. Bretz*

matter, the jury was sworn. In the matter *sub judice*, the jury was not sworn. Thereafter, in the *Crist v. Bretz* matter, without any activity on the part of the defendant, the State moved for a dismissal of the indictment and thereafter reindicted. In the instant matter, the Government moved for a severance of the petitioner without any activity on the part of the petitioner. To the contrary, the record accurately reflects that the petitioner opposed the granting of the severance and was ready to proceed to trial. In both instances the defendant alleged that any further trial would result in double jeopardy. In both instances, the claim of double jeopardy was disallowed and the defendants were brought to trial.

It is respectfully submitted that all of the rationale which is set forth as the basis for the determination of this Court, that double jeopardy did attach in *Crist v. Bretz*, is equally present and applicable to the situation in the instant matter. The contents of the Court's opinion would fail to set forth any significant distinction in a situation where the jury has not been sworn as contrasted to a situation where the jury has been sworn where all other facts are equal.

The attention of this Court is respectfully directed to pages 2160 and 2161 where Mr. Justice Stewart set forth:

> "The basic reason for holding that a defendant is put in jeopardy even though the criminal proceeding against him terminates before the verdict was perhaps best stated in *Green v. United States*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'

Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a trial might have been open to argument before this Court's decision in *Downum v. United States*, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100. There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial that jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed. 2d 642; *Serfass v. United States*, 420 U.S. 377, 388, 95 S. Ct. 1055, 1062, 43 L. Ed. 2d 265.

The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. That interest was described in *Wade v. Hunter, supra,* as a defendant's 'valued right to have his trial completed by a particular tribunal.' 336 U. S. at 689, 69 S. Ct. at 837. It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.

Regardless of its historic origin, however, the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. *United States v. Martin Linen Supply Co., supra; Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 1062, 43 L. Ed. 2d 265; *Illinois v. Somerville,* 410 U.S. 458, 467, 93 S. Ct. 1066, 1072, 35 L. Ed. 2d 425; *United States v. Jorn,* 400 U.S. 470, 478-480, 484-485, 91 S. Ct. 547, 553-554, 556-557, 27 L. Ed. 2d 543 (plurality opinion)."

The basis upon which the Court's decision is couched is a need for the preservation of the interest of this petitioner in retaining his chosen jury. That interest and constitutional right was completely frustrated by the action of the prosecutor severing the petitioner from the trial.

Since the trial record does not reveal any significant change in the situation from September 19, 1974 to September 23, 1974, the prosecutor should have set forth his desires to sever this petitioner prior to the selection of the trial jury. After its selection it cannot be totally denied that the action of the prosecutor, on September 23, 1974, might have been motivated by his dissatisfaction with the jury that had been chosen for the purposes of the trial of this petitioner. Absent any other method of denying this petitioner his right by trial by that jury, an application was made for a severance. This creates an unconscionable advantage to the United States Government and required that this Court reconsider the establishment of the point of jeopardy as to when a jury is selected and deemed satisfactory by both sides as opposed to the requirement of the formalistic swearing in of such jury.

The attention of the Court is also respectfully directed to the concurring opinion of Mr. Justice Blackmun who acknowledges that the arguments involving repetitive stress and anxiety upon the defendant; and continuing embarrassment for him, may validly be used to support the argument that jeopardy attaches at some point before the jury is sworn. The position of the petitioner herein is that that point should be immediately after the jury is designated as satisfactory by both sides and that the swearing in of the jury adds nothing that was not previously presented just immediately prior to such swearing in.

The dissenting opinion of Chief Justice Burger in no way constitutes an objection to the rationale of the majority opinion. It addresses itself to the binding quality of the majority opinion upon the States so that State and Federal practice will be uniform. It is the Chief Justice's position that there is no reason why State and Federal rules must be the same.

The dissenting opinion of Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, is based upon similar grounds to that of the dissenting opinion of the Chief Justice. Mr. Justice Powell sets forth that he would accept as the established supervisory rule with the Federal system that jeopardy would attach upon the swearing of the jury (see page 2167). Mr. Justice Powell went further and set forth that his acceptance of the attachment of jeopardy at the swearing of the jury would not necessarily impose that requirement upon the States (see page 2169).

From a careful study of the dissenting opinions, it is possible to conclude that all of the justices are agreed that jeopardy attaches upon the selection of a jury in the Federal jurisdiction. The position of the petitioner herein is that no great difference is created solely by the swearing in of that jury and that the selection of the jury should be the actual moment in a Federal prosecution where jeopardy attaches.

Since the jury was already sworn in *Crist v. Bretz*, this question was not before the court and was not determined by it. However, it is respectfully submitted that the determination in *Crist v. Bretz* does not fully determine the issue of when

jeopardy does attach. It is necessary that this Court consider as a companion to *Crist v. Bretz*, a situation where the jury is selected by the defendant and the jury is deemed satisfactory to both parties and a severance is, thereafter, granted prior to the swearing in of such jury where the defendant has registered his vehement objection to such severance.

CONCLUSION

The petitioner herein has set forth intervening circumstances not previously presented to the Court, which petitioner deems mandates the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit with respect to when jeopardy actually attached in the instant matter and the petitioner respectfully submits this brief in support of his various arguments.

Respectfully submitted,

s/ ROBERT E. LEVY
Attorney for Petitioners

Dated: October 16, 1978